SUPREME COURT, U. S.

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In The

# Supreme Court of the United States

October Term, 1975

No. 75-10

ANONYMOUS, an attorney admitted to practice in the State of New York,

*Petitioner,*

*vs.*

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October Term, 1975

No.

ANONYMOUS, an attorney admitted to practice in the State of New York,

*Petitioner,*

*vs.*

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, ANONYMOUS, an attorney admitted to practice in the State of New York, petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit entered in this case on April 3, 1975 (Docket No. 74-2183) affirming the judgment of the United States District Court for the Southern District of New York (Civil Action No. 74-Civ.-2398-TPG) denying petitioner injunctive relief and dismissing petitioner's complaint.

## OPINIONS OF THE COURTS BELOW

The opinion of the Court of Appeals dated April 3, 1975 is not yet officially reported. The decision of the District Court dated July 31, 1974 is not officially reported. Both opinions are printed in petitioner's appendix.

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 3, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Is a disciplinary proceeding which may lead to the disbarment of an attorney, a "civil" or a "criminal" proceeding with respect to the application of the attorney's Fifth Amendment rights?

2. Must a Federal District Court abstain from intervening to prevent the violation of an attorney's constitutional rights by a Bar Association Grievance Committee conducting a preliminary inquiry into the attorney's professional conduct?

3. Assuming, *arguendo*, that the federal abstention doctrine would otherwise apply, does this case present sufficient evidence of bad faith or such special or unusual circumstances as to justify Federal Court intervention?

## STATEMENT

### 1. The Facts

This action was commenced in June 1974 by petitioner, a New York attorney, pursuant to 28 U.S.C. §§1331, 1343, 2201 and 2202 and the Fifth and Fourteenth Amendments to the Constitution by the filing of a summons and a complaint with the Clerk of the District Court (29a). Petitioner seeks to enjoin the use against him of his own compelled grand jury testimony in connection with disciplinary proceedings conducted by the Committee on Grievances of the Association of the Bar of the City of New York ("Grievance Committee"). Petitioner contends that the attempted use of his compelled testimony violates the rights guaranteed to him by the Fifth and Fourteenth Amendments to the Constitution.

In December 1965, one of petitioner's clients, a builder ("builder"), requested petitioner's assistance in connection with a zoning variance sought from the New York City Planning Commission by a competitor. Petitioner, unfamiliar with such matters, mentioned the situation to an acquaintance who was active in the building industry and who offered to assist the builder. The acquaintance requested a fee which was transmitted to him from the builder via petitioner.

On October 18, 1968, approximately three years later, petitioner was summoned before a New York County grand jury investigating allegations that Michael Freyberg, former New York City Tax Commissioner, and James Marcus, former New York City Water Commissioner, had accepted bribes for

influencing official City action. Petitioner invoked his Fifth Amendment right, was granted transactional immunity and testified fully. No one was ever charged with any criminal activity arising out of the zoning matter and the evidence established that petitioner had no dealings with either Mr. Freyberg or Mr. Marcus.

Approximately one year *prior* to the time petitioner testified before the grand jury, Mr. Marcus was indicted for accepting bribes and "kickbacks" involving the cleaning of a New York City reservoir, a subject area completely divorced from that concerning which petitioner testified. Neither petitioner nor the builder were involved in the "Marcus scandal" in any way.

Mr. Freyberg was convicted of perjury on December 17, 1970 arising from his testimony to the grand jury concerning his relationship with Marcus. In February 1971, based upon the unsupported allegations of an Assistant District Attorney that the interests of justice would be furthered by releasing to the Grievance Committee certain grand jury minutes involving Mr. Freyberg and without a hearing on notice to the affected parties, a State Supreme Court Justice ordered the release of Freyberg's grand jury testimony. At the same time, the District Attorney's office also forwarded to the Grievance Committee the minutes of petitioner's grand jury testimony even though he was never linked in any manner with Mr. Freyberg and even though his testimony was never specifically requested. The Grievance Committee subsequently instituted disciplinary proceedings against Mr. Freyberg and he was suspended from the practice of law. Only after these proceedings were concluded did they turn their attention to petitioner.

Petitioner testified before the grand jury in 1968. Newspaper articles alluding to his testimony appeared in 1968. The minutes of his testimony were released to the Grievance Committee in 1971. However, it was not until January 11, 1973 that the Grievance Committee took any action regarding petitioner. This was seven years after the operative events, four years after the testimony and newspaper articles and two years after receipt of the grand jury minutes. The January 11, 1973 action taken by respondents was in the form of a request to appear at respondents' offices to "discuss" the grand jury testimony. Petitioner appeared, cooperated fully, volunteered a statement explaining his actions and denied any illegal or improper conduct.

On May 31, 1973, respondents brought formal disciplinary charges against petitioner based solely and exclusively upon his own compelled grand jury testimony elicited pursuant to a grant of transactional immunity. The Grievance Committee Panel which first heard the matter decided to sustain the charges and recommend to the Executive Committee of the Bar Association that the charges be prosecuted before the Appellate Division of the State Supreme Court. Thereupon, petitioner retained new counsel and moved to vacate the prior determination and for the reinstitution of disciplinary proceedings *de novo* on the grounds, *inter alia*, that the use of petitioner's compelled testimony before the grand jury violated his constitutional rights. This motion was granted in its entirety without opinion. Respondents then issued a new charge letter, assigned the case to a new Grievance Committee Panel and scheduled a new hearing. At the *de novo* hearing, respondents affirmed that they intended to sustain the charges against petitioner by relying solely and exclusively upon

petitioner's own testimony given pursuant to a grant of transactional immunity. Respondents then offered the minutes of petitioner's testimony in evidence; petitioner's counsel objected; this objection was overruled; and petitioner instituted this action in the Federal District Court seeking, *inter alia*, a permanent and a preliminary injunction enjoining respondents from proceeding. Respondents consented to the entry of a temporary restraining order and then moved to dismiss the action.

The District Court granted respondents' motion to dismiss and denied petitioner's motion for a preliminary injunction. Petitioner appealed to the United States Court of Appeals for the Second Circuit which on April 3, 1975 affirmed the District Court's rulings. Respondents did not oppose petitioner's motion for a stay pending the appeal to the Second Circuit.

**2. The Grievance Committee**

There is no statutory authority in New York which designates the Grievance Committee as the "special prosecutor" in matters of attorney discipline. Rather, Section 90(2) of the Judiciary Law of the State of New York specifically grants to the Appellate Division of the Supreme Court the exclusive power to "censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice." Section 90(7) of the Judiciary Law permits the Appellate Division to appoint an attorney "to conduct a preliminary investigation" which may lead to a disciplinary proceeding before the Court.

The only place that reference is made to the Grievance Committee is in Section 603.12 of the Rules of the Appellate Division, First Department. This rule permits the Grievance Committee, upon application to the Clerk of the Appellate Division stating that it is "conducting a preliminary investigation of professional misconduct on the part of an attorney," to have a subpoena issued to compel attendance before it. The attorney who is the subject of the "preliminary investigation" has the same subpoena power.

The actual procedures of the Grievance Committee are not set forth in New York's statutory law nor are they set forth in the Rules of the Appellate Division. Its actual procedures are contained in the By-Laws of the Bar Association itself. Its rules provide that a panel of the Grievance Committee may "either dismiss or sustain the charges and, as to any charges sustained, shall either admonish the respondent or recommend that such charges be prosecuted in the court." If prosecution is recommended, the panel must first submit a written report and recommendations to the Executive Committee of the Bar Association which may "take such action upon such report as in its judgment is proper." If the Executive Committee decides that prosecution is warranted, it then refers the matter to the Appellate Division which appoints a special referee who conducts a hearing on the referred charge *de novo*.

Petitioner's case has never proceeded beyond the panel's preliminary investigation. No recommendation has been made to the Executive Committee, no recommendation has been made to the Appellate Division and no evidence has been admitted before the panel itself except for the charge letter and

petitioner's answer. The proceedings of which petitioner complains have only just begun and are in their infancy.

## REASONS FOR GRANTING THE WRIT

### I.

The New York Courts have consistently violated the Constitutional rights of attorneys by treating disciplinary proceedings as "civil" in nature and thereby beyond the scope of the Fifth Amendment. *Matter of Zuckerman,* 20 N.Y.2d 430; *cert. denied,* 390 U.S. 925 (1968); *Matter of Klebanoff,* 21 N.Y.2d 920, *cert. denied,* 393 U.S. 840 (1968). This Court has never ruled directly on the issue but its decisions in the past ten years respecting the reach of the Fifth Amendment lead inescapably to the conclusion that the New York "rule" is erroneous.

Petitioner, when called to testify before a grand jury, properly invoked his Constitutional privilege against self-incrimination guaranteed to him by the Fifth Amendment to the United States Constitution. Petitioner was then granted full transactional immunity, the broadest immunity possible under New York law. See, *People v. Laino,* 10 N.Y.2d 161 (1961); Code Crim. Proc. §619-c; CPL §190.40 Subd. 2. Nevertheless, respondents seek to deprive petitioner of his license to practice law on the basis of his otherwise immunized testimony.

The New York cases [*Matter of Zuckerman, supra; Matter of Klebanoff, supra*] sanction respondents' actions and are in manifest conflict with the decisions of this Court and of other

jurisdictions which have considered the matter. In *Spevack v. Klein*, 385 U.S. 511 (1967), an attorney's right to assert the privilege against self-incrimination in a disciplinary proceeding was upheld. The same right was sustained by the United States Supreme Court the following year in *Gardner v. Broderick*, 392 U.S. 273 (1968) and in *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280 (1968). In these latter cases it was held that neither an attorney nor a public employee could be discharged for refusal to sign a waiver of Fifth Amendment rights before a grand jury or for refusing to answer questions in violation of Fifth Amendment rights before an administrative tribunal.

However, even though the New York Courts view the disciplinary proceedings as "civil" in nature and even though respondents prosecute attorneys and deprive them of their Fifth Amendment rights in the New York Courts, when faced with a Federal Court action which seeks to enforce certain constitutionally guaranteed rights, respondents contend that the Federal Courts must *abstain* from asserting jurisdiction under the doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), on the grounds that a disciplinary proceeding is tantamount to a pending state *criminal* proceeding. Petitioner is thus deprived of his Fifth Amendment rights in the State Courts since a disciplinary proceeding is categorized as "civil" and he is also deprived of his right to seek relief in the Federal Courts due to the application of the abstention doctrine to a pending state criminal (or criminal-related) proceeding. The conflict between the decisional law in the Federal Courts and that in the State Courts regarding the classification of disciplinary proceedings must be reconciled. The United States Supreme Court must

finally rule as to whether the Fifth Amendment's protection against self-incrimination is applicable in disciplinary proceedings.

The United States Supreme Court has already ruled that:

> "Disbarment . . . is a *punishment* or *penalty* imposed on the lawyer." *In re Ruffalo*, 390 U.S. 544, 550 (1967). (Emphasis added.)

The Fifth Amendment states in pertinent part:

> ". . . no person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

The Fourteenth Amendment protects this Fifth Amendment privilege against State invasion. *Malloy v. Hogan*, 378 U.S. 1 (1964). A brief review of the history of the Fifth Amendment's protection against self-incrimination clearly demonstrates that its purpose was to protect persons from being compelled to answer questions which have a tendency to expose one to a punishment, a penalty or a forfeiture. The early English case of *Brownsword v. Edwards*, 2 Ves. sen. 243, 28 Eng. Rep. 157 (1750) involved a situation where the defendant refused to testify on the subject of whether she was "lawfully married" to a certain individual. Her refusal was based on the ground that if she admitted to the marriage she would be confessing to an act which, although legal under the common law, would render her liable to prosecution in the ecclesiastical court. The Lord Chancellor, in upholding the defendant's right to remain silent, stated:

> "The general rule is, that no one is bound to answer so as to subject himself to punishment, whether that *punishment* arises by the ecclesiastical law or the land." (Emphasis added.)[1]

The early English legal theory, of course, was adopted by our courts. Chief Justice John Marshall, in *United States v. Saline Bank of Virginia*, 1 Pet. 100 (1828), a case in which the United States sought to recover bank deposits and the defendants resisted discovery because it might lead to an admission that they had violated the laws of the Commonwealth of Virginia, stated:

> "It is apparent that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to *penalties*." (Emphasis added.)

It should be noted that Chief Justice Marshall included "penalties" within the ambit of the Fifth Amendment's protection. In *United States of America v. McRae*, L.R., 3 Ch. App. 79 (1867), the English Court of Chancery Appeal ruled that:

> ". . . a witness is protected from answering any question which has a *tendency to expose him to forfeiture* for a breach of our own municipal law." (Emphasis added.)

1. See discussion in *Murphy v. Waterfront Comm'n.*, 378 U.S. 52, 58-63 (1963).

Thus, it is crystal clear that the foundation of the Fifth Amendment's privilege against self-incrimination is the principle that no person should be compelled to give testimony which may lead to subjecting himself to a "punishment," a "penalty" or a "forfeiture."

Petitioner is now in imminent danger of suffering a "punishment," a "penalty" and a "forfeiture" as defined by the United States Supreme Court and the decisional history of the privilege against self-incrimination since respondents have clearly demonstrated that they intend to use petitioner's compelled grand jury testimony against him in a disciplinary proceeding which may lead to his disbarment. Petitioner's disbarment will deprive him of his right to practice law and his ability to earn a living. It is beyond peradventure that the impact upon petitioner is much greater than the mere loss of property or a sum certain in money. This Court has recognized that the mere appellation "civil" or "criminal" is *not* determinative when a forfeiture is present. This doctrine was recently reaffirmed by this Court in *United States v. U.S. Coin and Currency,* 401 U.S. 715, 718 (1971) when it was ruled that:

> "[B]ut as *Boyd v. United States,* 116 U.S. 616, 634 (1886), makes clear, 'proceedings instituted for purpose of declaring the forfeiture of a man's property by reasons of offenses committed by him, though they may be civil in form, are in their nature criminal' for Fifth Amendment purposes."

Upon being compelled to testify before the grand jury by the grant of immunity, after petitioner invoked his Fifth

Amendment privilege, petitioner became entitled to immunity from *all* penalties, punishments and forfeitures within the scope of the privilege regardless of the intended reach of the grant.[2] The compulsion of incriminating testimony generates immunity from sanctions which are "criminal in nature," *(Ullmann v. United States,* 350 U.S. 422, 431 (1956)), whether or not the immunity is contemplated when the testimony is compelled. *Garrity v. New Jersey,* 385 U.S. 493 (1967).

The denial of the right to engage in the practice of law or in other occupations has been held similar to a criminal penalty for purposes of other constitutional provisions than the Fifth Amendment. An attorney has been held "entitled to procedural due process, which includes fair notice of the charge" in disciplinary proceedings. *In Re Ruffalo, supra,* 550 (1968). Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's Bill of Attainder and *ex post facto* prohibitions. *Ex parte Garland,* 4 Wall. 333, 377 (1867) [Legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"]; *Cummings v. Missouri,* 4 Wall. 277, 327 (1867) ["permanent proscription from any opportunity to serve the Government is punishment"]; *United States v. Brown,* 381 U.S. 437 (1965) [disqualification from holding union office held punishment]. No reason is readily apparent why disqualification

2. The immunity thus conferred relates to all testimony given by petitioner before the grand jury and *any* use that may be made thereof. Hence, petitioner's failure to deny his testimony and his explanation thereof at the aborted first hearing before the Grievance Committee cannot be deemed a waiver as suggested by the District Court. Once immunity became affixed, it became absolute and inviolate. Petitioner had no reason to deny his testimony or to keep it confidential.

from practicing law, which has been regarded as a criminal penalty for the purpose of other constitutional safeguards, should not similarly be regarded as criminal punishment for purposes of the privilege against self-incrimination.

*Spevack v. Klein, supra,* decided that a lawyer cannot be disbarred because of his refusal to testify at a disciplinary investigation in reliance on the privilege against self-incrimination. Petitioner, however, under threat of contempt, was compelled to forego the privilege and supply inculpatory information. The fruits of this compulsion are the *sole basis* of these proceedings. *Boyd v. United States, supra,* held that "a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment" (116 U.S. at p. 622). Coerced production of evidence to forfeit an attorney's right to practice law would appear to be comparable in penal effect to forfeiture of property. The policy of the exclusionary rule to discourage violation of the Constitutional protection would seem to preclude the use of evidence obtained in violation of the Fourth Amendment in a civil (if a disciplinary proceeding is indeed "civil") as well as a criminal proceeding. Evidence tainted by an unreasonable search has been held inadmissible in an administrative proceeding which resulted in a cease and desist order. *Knoll Associates, Inc. v. Federal Trade Commission,* 397 F.2d 530 (7th Cir. 1968). The same policy should preclude use in disciplinary proceedings of the product of the constitutional invasion to the detriment of the person whose constitutional privilege was violated. The present case thus presents important considerations under the Fourth, as well as the Fifth Amendment to the United States Constitution.

## II

The Court of Appeals has misconstrued this Court's recent decision in *Huffman v. Pursue, Ltd.*, 43 LW 4379 (1975) and *Steffel v. Thompson*, 415 U.S. 452 (1974) to bar Federal Court review of the constitutional issues presented by petitioner. The Second Circuit invoked the federal abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971) on the grounds that *Huffman* mandates abstention in virtually all cases of pending State Court judicial proceedings.

The doctrine of federal abstention as set forth in *Younger*, *Steffel* and *Huffman* simply should *not* be applied in this case. The abstention doctrine requires the actual existence of a state criminal proceeding (*Steffel v. Thompson, supra*, p.462) or the existence of a judicial proceeding which is both in aid of and closely related to the enforcement of a criminal statute and to which the State is an actual party-plaintiff (*Huffman v. Pursue, Ltd., supra*, p.4382). Here there is no actual state criminal prosecution pending. Here there is no actual proceeding which is both in aid of or closely related to the enforcement of a criminal statute. Here the State is not a party to any proceeding. Here there is no actual State Court proceeding of any kind pending. Hence, the doctrine of federal abstention does not apply and the Courts below erred in dismissing the complaint.

*Younger v. Harris, supra*, involved a situation where the petitioner had "been indicted, and was actually being prosecuted by California for a violation of its Criminal Syndicalism Act at the time suit was filed." *Younger v. Harris, supra*, p.41. This Court in *Younger* ruled that when a state

*criminal proceeding* under a disputed state *criminal statute is pending* against a federal plaintiff at the time his federal complaint is filed, a Federal Court must abstain unless bad faith enforcement or other special circumstances are demonstrated.

*Steffel v. Thompson, supra,* involved a case where the petitioner had been distributing handbills protesting American involvement in Vietnam on a shopping center's private sidewalk. He and others were asked to leave and declined to do so. The police were called and the group then left to avoid arrest. Two days later the same chain of events occurred, except that one person remained. He was arrested and charged with criminal trespass. Petitioner in *Steffel* instituted a federal action alleging that he desired to return to distribute handbills but he had not done so because of his concern that he would also be arrested. It was stipulated that had he returned he would have been arrested for criminal trespass. This Court found that when, as in *Steffel,* there is no state criminal prosecution pending against the federal plaintiff and the federal plaintiff has alleged threats of actual prosecution, the principles of federalism not only do not preclude federal intervention, they compel it. (*Supra,* p.472.)

In *Huffman v. Pursue, Ltd., supra,* petitioner was the defendant in a civil action commenced by the State pursuant to a statute which provided that a place which exhibits obscene films is a nuisance, subject to closure for up to one year and the sale of all personal property used in conducting the nuisance. In *Huffman,* this Court extended the *Younger — Steffel* rule to include a situation where the State itself is a party to a *civil* proceeding which is both in aid of and closely related to *criminal* statutes which prohibit the dissemination of obscene materials

*(supra,* p.4383). However, even in this limited extension of the doctrine, there was an actual pending proceeding against the federal plaintiff (albeit categorized "civil") when the federal complaint was filed.

In *Ellis v. Dyson,* 43 LW 4615 (1975), this Court reaffirmed its decision in *Steffel v. Thompson, supra,* that the *Younger* doctrine does not apply where there is merely a *threatened* state criminal prosecution (*supra,* p.4617). This Court further reaffirmed the principle that the threat must be genuine (*supra,* p.4617).

The facts of the case at bar clearly mandate that the *Younger* abstention doctrine should not apply. First, under New York law there is no state *criminal* proceeding as required by *Younger.* Second, the State is not a party to this proceeding nor is the disbarment proceeding in aid of or closely related to the enforcement of a *criminal* statute as required by *Huffman.* Third, there is no state statute for petitioner to attack herein as there was in *Younger, Steffel, Huffman* and *Ellis;* but rather petitioner is attacking the decisional law of the State. However, there is present the genuine threat of a proceeding against petitioner which historically would afford petitioner the benefit of his Fifth Amendment rights.

The Court below obviously misinterpreted the abstention doctrine when it applied *Huffman v. Pursue, Ltd., supra,* and *Erdmann v. Stevens,* 458 F.2d 1205 (2d Cir. 1972), *cert. denied,* 408 U.S. 889 (1972). *Huffman* did not extend the abstention doctrine to all civil actions,[3] but rather it quite specifically

3. New York's decisional law classifies disbarment proceedings as "civil."

extended the doctrine to only those civil actions where (1) the State is an actual party and (2) the proceeding itself is both in aid of and closely related to the enforcement of criminal statutes. *Huffman v. Pursue, Ltd., supra,* p.4384. Here, the State is *not* an actual party and there is no allegation that this matter concerns the enforcement of any state *criminal* statute. Thus, *Huffman's* application below was error.

*Erdmann* involved a disbarment situation but at a totally different stage. In *Erdmann,* the Grievance Committee conducted its preliminary investigation and reported to the Executive Committee which decided that no disciplinary action should be taken against *Erdmann.* However, the Justices of the Appellate Division themselves instituted disciplinary proceedings against *Erdmann at the Appellate Division level.* The Court correctly found that this proceeding at the Appellate Division level was a judicial proceeding (*supra,* p.1209). In the case at bar, we are merely at the very first step of the *preliminary investigation stage.*[4] The Grievance Committee has not yet heard any evidence, no recommendation has been made to the Executive Committee, the Executive Committee has not made a recommendation to the Appellate Division and the Appellate Division has not commenced its *de novo* hearing. *Erdmann* was at the *de novo* hearing stage when he commenced his federal action. Petitioner herein was at the very first step of the preliminary investigation. In *Erdmann,* there was a pending *judicial* proceeding; in the case at bar, there is absolutely no pending judicial proceeding.

4. See Section 603.12 of the Rules of the Appellate Division, First Department and Article XIX of the Bar Association's By-Laws.

The Court below has misinterpreted the issue herein. The opinion below emphasized the Court's

> "reluctance, and indeed refusal, to intrude in the application of standards of professional conduct and moral character by state courts to their court officers."

The inference is that petitioner has requested that the Courts below should pass upon his conduct or character. This is totally inaccurate; petitioner has only requested that the Courts protect his constitutionally guaranteed rights. This is an issue separate and apart from his conduct or character.

Unfortunately, the Court below fell into respondents' "catch twenty-two" when it compared *Huffman* with the case at bar and found that:

> "The interest of the state court in adjudicating the continuing professional fitness and character of its own officers is at least as great as the interests of the State of Ohio in policing the exhibition of pornographic material."

In *Huffman*, the "policing the exhibition of pornographic material" was within the scope of Ohio's *criminal* statutes with a complimentary civil statute. In the case at bar, the entire proceeding is considered to be "civil" by New York. There is no criminal statute or proceeding involved, according to New York law. It is, therefore, submitted that there is no state *criminal*

proceeding nor is there a state judicial proceeding involved herein. Accordingly, the federal abstention doctrine should not be applied.

Particularly instructive is the Second Circuit's decision in *Tang v. Appellate Division of New York Supreme Court, First Department*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974), where the plaintiff-attorney sought to maintain his federal action after the state court had rejected his federal constitutional claim. There the plaintiff challenged the New York bar admission procedures and it was held that his federal action came too late because the state court had already acted so that plaintiff's only recourse was to appeal to the highest state court and thence to the United States Supreme Court. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Significantly, it was held that the plaintiff-attorney in *Tang* could have brought his action in the federal court *in the first instance* but, having chosen the state court route, he could not switch in mid-stream. Judge Hays, concurring, held that the plaintiff was barred because the State Court's adverse determination was *res judicata*. Judge Oakes dissented on the grounds that the plaintiff-attorney had not really made a choice of forums and hence was free to invoke federal jurisdiction.

In *Tang*, Judge Oakes, in dissent, anticipated the situation presented herein when he noted:

> " . . . There is dicta in *Erdmann*, 458 F.2d 1210, which on its face, would apply equally to disciplinary and admission proceedings. However, then Chief Judge Friendly, writing for

> a three-judge court in *Law Students Civil Rights Research Council, Inc. v. Wadmond,* 299 F.Supp. 117, 124 (S.D.N.Y. 1960), aff'd, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971), explicitly rejected a comity-abstention argument in a direct attack on state bar admission procedures. *Even application of the doctrine of 'comity' in the disciplinary context in Erdmann is open to dispute in Gibson v. Berryhill,* 411 U.S. 564, 575-577, 93 S.Ct. 1689, 36 L.Ed. 2d 488 (1973). See *Polk v. State Bar of Texas,* 408 F.2d 998, 1001-02 & n. 10 (5th Cir. 1973)." (Emphasis added.) 487 F.2d at p.146.

The Court below rejected Judge Oakes' rationale and the applicability of this Court's decision in *Gibson v. Berryhill,* 411 U.S. 564 (1973), on the grounds that in *Gibson* the disciplinary proceeding sought to be enjoined was before the State Board of Optometry, not any court or any committee acting under powers granted by a court. It is submitted that this is a distinction without a difference. The State Board of Optometry stands *pari passu* with the Grievance Committee relative to professional discipline. To place an attorney in a special category, separate and apart from other professionals, simply because of the supposed unique relationship between an attorney and the court before which he practices constitutes an invidious discrimination unwarranted by experience or constitutional necessity. Certainly, an attorney is entitled to no less protection under the Constitution and federal law than the physician, the dentist and the optometrist. Furthermore, petitioner herein commenced his federal action *in the first* instance and as early as he possibly could.

If the decision in *Tang* cast doubt on *Erdmann*, the Supreme Court's decisions in *Steffel v. Thompson, supra*, and *Allee v. Medrano*, 42 LW 4736 (1974), make it clear that neither the absence of a pending state prosecution nor the failure to satisfy the bad faith or special circumstances standards of *Younger v. Harris* precludes a plaintiff threatened with prosecution from obtaining declaratory relief in federal court as to certain state action.

In *Allee*, the Supreme Court, in dealing with an action brought under the Civil Rights Act (42 U.S.C. §1983) by a picketing union against Texas law enforcement officers, upheld the plaintiff's rights to seek federal court intervention by way of declaratory relief *before* the commencement of a state criminal prosecution.

The Court below incorrectly invoked the doctrine of federal abstention in this case. Respondents are not a quasi-judicial body and certainly are not part of the state court system. No state prosecution or proceeding is pending. Even if petitioner may not be entitled to injunctive relief he is entitled, at the very least, to the declaratory judgment sought in his complaint determining whether the use by respondents of his compelled testimony elicited under a grant of transactional immunity before a grand jury violates his constitutional rights. See *Perez v. Ledesma*, 401 U.S. 82, 93 (1971) (separate opinion of Justices Brennan, White and Marshal).

Federal Courts are not compelled to abstain in cases where there are substantial Constitutional rights involving matters of professional fitness. Thus, in *Schware v. Board of Examiners*,

353 U.S. 232 (1957) and in *Law Students' Civil Rights Research Council v. Wadmond*, 401 U.S. 154 (1971) the Supreme Court readily considered matters of character and fitness for admissions to the Bar. Certainly, if matters of Bar *admission* are cognizable on their merits by the Federal Court, matters of Bar *removal* or discipline should similarly be cognizable.

## III

Assuming, *arguendo*, that the federal abstention doctrine is held to be applicable to disciplinary proceedings pending before the Bar Association, the doctrine is nevertheless inapplicable because of the special or unusual circumstances presented in this case. First, there is the fact that the *only time* respondents consider disciplinary proceedings to be "criminal" is when they seek to dismiss federal complaints which attempt to protect constitutionally guaranteed rights. At all other times, respondents consider disciplinary proceedings to be "civil" so that, *inter alia*, the Fifth Amendment's privilege against self-incrimination would not apply. Thus, respondents can "have their cake and eat it also." They can prevent the Federal Courts from asserting jurisdiction and deprive persons of their rights. It is respectfully submitted that this fact, in and of itself, is a special and unusual circumstance which compels the rejection of the federal abstention doctrine herein.

Second, there is the inordinate delay on respondents' part in proceeding against petitioner seven years after the operative events and five years after the respondents knew or should have known of his alleged involvement in such events. Third, there is the promise of the District Attorney not to refer petitioner's

testimony to the Grievance Committee for disciplinary action, a promise clearly breached by the District Attorney (45a).

The abstention principle enunciated in *Younger* and subsequent cases does not apply where a petitioner demonstrates bad faith, harassment or other extraordinary circumstances in which irreparable injury can be shown even in the absence of bad faith or harassment. See, *Lewis v. Kugler*, 446 F.2d 1343 (3rd Cir. 1971); *Fowler v. Vincent*, 366 F. Supp. 1224 (S.D.N.Y. 1973); *General Corporation v. Sweeton*, 365 F. Supp. 1182 (N.D. Ala. 1973). Here, petitioner testified before the grand jury late in 1968 respecting his 1966 involvement in a particular transaction. In December 1968 and January 1969 newspaper articles appeared mentioning these events. In January 1971 respondents actually procured the grand jury minutes. Nevertheless, no proceeding was initiated by respondents until 1973, some two years later. Moreover, the State Court order releasing the grand jury minutes to respondents clearly relates to another attorney (Freyberg) and not to petitioner so that it is questionable whether petitioner's testimony is properly in respondents' hands.

Respondents have never offered any justification for these inordinate delays and the Courts below held that delay does not amount to bad faith or harassment as a matter of law. This, it is submitted, is erroneous. The unexplained and unjustified delay in this case is *prima facie* bad faith and harassment; and, at the very least, the District Court should have held a hearing on this issue.

A hearing should also have been held respecting petitioner's charge that the District Attorney had acted improperly by

forwarding to respondents the transcript of petitioner's grand jury testimony. Petitioner alleges that he was assured in advance of testifying that this would not happen and the Court's order releasing testimony to respondents, on its face, relates to Freyberg and not to this petitioner. Here, again, the Court below erroneously held that, as a matter of law, this could not be deemed bad faith within the meaning of *Younger v. Harris, supra.*

Finally, even in the absence of manifest bad faith, the abstention doctrine should not have been applied in this case because the New York Courts (as set forth in I of this Petition) have already pre-determined the constitutional issue adversely to petitioner so that to permit the pending proceedings to continue would be of no avail. Where, as here, pending state prosecution does not afford an adequate remedy for the vindication of the federal constitutional rights at issue the Federal Courts *must* intervene.

The New York Courts have consistently taken the position that the position of an attorney is *sui generis* such that he may be disbarred and thereby deprived of his means of livelihood solely on the basis of testimony extracted from him pursuant to a grant of immunity. *Matter of Epstein,* 37 A.D.2d 333 (1st Dept. 1971). The New York cases are predicated on the proposition that disciplinary proceedings against an attorney are civil in nature whereas the privilege against self-incrimination and the granting of transactional immunity apply only in criminal proceedings. *Matter of Zuckerman, supra; Matter of Klebanoff, supra.*

The New York Courts have spoken. To raise the question again is but an exercise in futility.

## CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted. At the very minimum, this Court should rule on the issue of whether a disciplinary proceeding is a "criminal" or a "civil" proceeding. If this Court rules that it is in fact a "criminal" proceeding, the doctrine of federal abstention may very well *then* apply. However, petitioner's Fifth Amendment rights would also be protected because the State Courts would be bound by this Court's determination. If this Court rules that the proceeding is "civil," the abstention doctrine would not apply and the issue raised by petitioner in his complaint could be adjudicated.

Respectfully submitted,

ARTHUR S. OLICK, ESQ.
*Attorney for Petitioner*

STEVEN M. PESNER
Anderson Russell Kill & Olick, P.C.
*Of Counsel*

## OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 508—September Term, 1974.

(Argued February 19, 1975 Decided April 3, 1975.)

Docket No. 74-2183

ANONYMOUS, AN ATTORNEY ADMITTED TO PRACTICE IN THE STATE OF NEW YORK,

*Plaintiff-Apellant,*

—against—

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

*Defendants-Appellees.*

Before:

ANDERSON, MULLIGAN and VAN GRAAFEILAND,

*Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Hon. Thomas P. Griesa, *Judge,* denying plaintiff's motion for a preliminary injunction and granting defendants' motion to dismiss the complaint, which sought injunctive and declaratory relief against the use by the defendants in disciplinary proceedings commenced by them against the plaintiff attorney of

grand jury testimony compelled from the plaintiff under a grant of immunity.

Affirmed.

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ARTHUR S. OLICK, New York, New York (Anderson, Russel, Kill & Olick, New York, New York, Steven M. Pesner, of Counsel), *for Plaintiff-Appellant.*

SAUL FRIEDBERG, New York, New York, *for Defendants-Appellants.*

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MULLIGAN, *Circuit Judge:*

The plaintiff is an attorney at law admitted to practice in the State of New York. On October 18, 1968, he was called to testify before a New York County grand jury which was then investigating possible undue influence upon the New York City Planning Commission. Before he testified he was granted transactional immunity,[1] and he there-

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1 The grant of immunity was made in the following manner:

> The granting of immunity means you cannot be prosecuted for any State violation as a result of your testimony here today or documents that you may have produced here today. However, you can be prosecuted for the crime of perjury, or if you lie to this Grand Jury, tell the Jury something that is not truthful, and for the crime of contempt, if you refuse to answer a question, a legal, proper and relevant question, or if you give an answer that can be deemed to be evasive.
>
> . . . .
>
> I remind you that immunity is still in effect and I also caution you that if this Grand Jury believes that you are avoiding or attempting to avoid giving answers to the questions or deliberately avoiding giving answers to questions, that you can be charged with contempt for that; and if you lie to this Grand Jury, that you can be charged with the crime of perjury.
>
> . . . .
>
> As I explained before, those are the only two State crimes that you can be charged with as a result of your testimony here today or documents that you produce here.

after testified on October 18, November 15 and November 21, 1968. On February 4, 1971, a justice of the Supreme Court, New York County, issued an order which authorized the District Attorney of New York County to release the minutes of the plaintiff's testimony to the Grievance Committee of the defendant Association of the Bar of the City of New York (Committee), and, pursuant to the order, some 1500 pages of minutes were delivered to the Committee in March, 1971. On January 11, 1973, the Committee invited the plaintiff to appear and discuss his grand jury testimony in connection with a review by the Committee of the conduct of certain attorneys who had appeared before the grand jury in 1968. Plaintiff did not appear before the Committee but rather submitted through counsel, on April 26, 1973, a twenty-five page statement which, in substance, provided all the information contained in his earlier grand jury testimony. On May 31, 1973, counsel for the Committee instituted a disciplinary proceeding against the plaintiff by serving on him a notice containing the charge made against him and the alleged facts upon which it was based. On June 13, 1973, plaintiff submitted an answer substantially admitting the facts set forth by counsel for the Committee but denying knowledge of any illegal activity which may have taken place with regard to the Planning Commission.

A hearing was held before a panel of the Committee on June 21, 1973, and the plaintiff appeared with counsel. The grand jury minutes containing plaintiff's testimony were admitted in evidence without objection by plaintiff's then counsel. The panel sustained the charges and made the recommendation that further disciplinary proceedings be brought in the Appellate Division, First Department, of the New York Supreme Court. Thereafter, plaintiff obtained new counsel, who requested a new hearing on the

ground, *inter alia*, that the use of the immunized grand jury minutes violated plaintiff's constitutional rights under the Fifth Amendment. A new hearing was granted by the Committee, and, on April 16, 1974, a new charge letter was sent to the plaintiff; the hearing was held on May 7, 1974 before a new panel of the Committee. The grand jury minutes were again offered, and, this time over the objection of plaintiff's counsel, were admitted into evidence. The hearing was then adjourned until June 4, 1974. On that date, plaintiff commenced an action in the United States District Court for the Southern District of New York for declaratory and injunctive relief under 28 U.S.C. §§ 1331, 1343, 2201 and 2202.

Plaintiff moved by order to show cause for a preliminary injunction and the defendants made a cross-motion for judgment dismissing the complaint for failure to state a claim on which relief could be granted. Both motions were heard on July 3, 1974 before Hon. Thomas P. Griesa, United States District Judge, who handed down an opinion and order dated July 31, 1974, which denied the plaintiff's motion and granted the defendants' cross-motion dismissing the complaint. This appeal followed. Further proceedings by defendants have been stayed pending the determination of the appeal by this court.

I

The court below did not reach the constitutional issue raised by the plaintiff (the impropriety of defendants' use of plaintiff's compelled testimony in disciplinary proceedings against him) but based its determination on the ground of abstention, relying upon *Younger* v. *Harris*, 401 U.S. 37 (1971) and the application of its doctrine by this court in *Erdmann* v. *Stevens*, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972). In *Erdmann*, the justices of the Appellate Division, First Department, of the State of

New York had served upon the plaintiff a petition and order to show cause charging him with ethical violations arising from statements attributed to him in an article in which he allegedly attacked, in colorful terms, the competence and the character of the state trial and appellate courts. *Erdmann* brought an action in the United States District Court for the Southern District of New York, urging that the proceeding brought by the justices was for the purpose of discouraging and preventing his exercise of First Amendment rights. This court unanimously held that the abstention doctrine of *Younger* v. *Harris*, *supra*, was applicable and required dismissal of the complaint, with both the majority opinion of Judge Mansfield (writing also for Judge Mulligan) and the concurring opinion of Judge Lumbard emphasizing our reluctance, and indeed refusal, to intrude in the application of standards of professional conduct and moral character by state courts to their court officers. Thus, Judge Mansfield observed:

> The relationship between a court and those practicing before it is a delicate one. It would appear axiomatic that the effective functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large. It requires little vision to appreciate that if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness.

458 F. 2d at 1210. Judge Lumbard also stated:

> While these principles [*Younger* abstention] were stated in cases involving state criminal proceedings,

> I believe that they apply with equal force to proceedings regarding the conduct of members of the state bar. The state "has a legitimate interest in determining whether [an individual] has the qualities of character and the professional competence requisite to the practice of law." Baird v. State Bar of Arizona, 401 U.S. 1, 7, 91 S.Ct. 702, 706, 27 L.Ed.2d 639 (1971). Indeed the state's responsibility in these matters is primary. A lawyer to practice anywhere in the United States must first be admitted to the bar of one of the states. In New York, as in all of the states, the proper functioning of the judicial system depends upon the competence and integrity of the members of the bar and their compliance with appropriate standards of professional responsibility.

458 F.2d at 1213.

Appellant's principal assault upon *Erdmann* is founded upon the contention that *Younger* abstention does not properly apply since the pending disciplinary proceedings are civil in nature, although appellant somewhat anomalously asserts at the same time that they are criminal with respect to the vesting of Fifth Amendment privileges. Appellant claims that *Erdmann* has been eroded by Judge Smith's comment in his opinion for this court in *Blouin* v. *Dembitz*, 489 F.2d 488, 490-91 (1973) that *Younger* abstention should be limited to cases involving traditional criminal proceedings until the Supreme Court instructs otherwise. The opinion did not cite *Erdmann* and of course did not purport to override it. More significantly, however, the Supreme Court has recently instructed otherwise and has explicitly extended the *Younger* doctrine so that its application does not depend upon the simplistic civil-criminal dichotomy.

In *Huffman* v. *Pursue, Ltd.*, 43 U.S.L.W. 4379 (U.S. March 18, 1975), a sheriff and a prosecuting attorney of an Ohio county instituted a proceeding under a state statute which provided that a place which exhibits obscene films is a nuisance; the statute mandated closure for up to a year as well as authorizing preliminary injunctive relief, the sale of all personal property used in conducting the nuisance and the release of the closure order only upon the satisfaction of certain conditions. The state court determined that the theatre in question had exhibited obscene films and ordered its closure for a year. Appellee, Pursue, Ltd., successor to the leasehold to the theatre, rather than appealing the state court order filed suit based on 42 U.S.C. § 1983 in the federal district court, seeking a declaration that the Ohio statute was unconstitutional and also requesting injunctive relief. A three-judge district court concluded that the statute constituted an overly broad prior restraint on First Amendment rights and issued permanent injunctive relief.

On direct appeal the Supreme Court vacated the lower court decision, holding *Younger* applicable. Mr. Justice Rehnquist noted in his opinion for the Court that, while *Younger* did involve pending criminal proceedings, the Court in that case had explained that

> this doctrine "is reinforced by an even more vital consideration," an aspect of federalism which we described as
>
> > "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to per-

form their separate functions in their separate ways."

*Id.*, at 44.

Central to *Younger* was the recognition that ours is a system in which

"the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Ibid.*

Id. at 4382.

The *Huffman* Court stated further that:

interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state court's ability to enforce constitutional principles."

The component of *Younger* which rests upon the threat to our federal system is thus applicable to a civil proceeding such as this quite as much as it is to a criminal proceeding.

Id. at 4383 (citation omitted).

In addition to its basic underpinnings of federalism and comity, *Younger*, the *Huffman* Court indicated, also rested upon the traditional reluctance of courts of equity to interfere with criminal proceedings.

[W]hatever may be the weight attached to this factor in civil litigation involving private parties, we deal

here with a state proceeding which in important respects is more akin to a criminal prosecution than are most civil cases. The State is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the State's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding.

Id.

*Huffman* thus establishes that the principles of comity and federalism which are at the heart of *Younger* are not to be discarded simply because the state action sought to be enjoined is yclept civil.[2] The further inquiry is whether the proposed interference in the civil case is comparable to the disruption in *Huffman* of the state's interest in maintaining the standards of its criminal laws. We noted in *Erdmann* that the Supreme Court (*In re Ruffalo*, 390 U.S. 544, 551 (1968)) had characterized disbarment proceedings to be "of a quasi-criminal nature." 458 F.2d at 1210. They are thus similar to the Ohio civil closure and injunctive procedures in *Huffman* and involve much more than private litigation between individual litigants.

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2 The rejection of the civil-criminal litmus test in *Huffman* was presaged by other circuits, in addition to our own holding in *Erdmann*. *Lynch* v. *Snepp*, 472 F.2d 769, 773 (4th Cir. 1973), cert. denied, 415 U.S. 983 (1974); *Palaio* v. *McAuliffe*, 466 F.2d 1230, 1232-33 (5th Cir. 1972); *Cousins* v. *Wigoda*, 463 F.2d 603 (7th Cir.), application for a stay denied, 409 U.S. 1201 (1972). In denying the stay in *Cousins*, Justice Rehnquist noted:

> While *Younger* and its companion cases involved state criminal prosecutions, the principles of federal comity upon which it was based are enunciated in earlier decisions of this Court dealing with civil as well as criminal matters.

409 U.S. at 1205.

The interest of the state court in adjudicating the continuing professional fitness and character of its own officers is at least as great as the interests of the State of Ohio in policing the exhibition of pornographic material. Today more than ever, the integrity of the bar is of public concern and the state which licenses those who practice in its courts, and which is the only body that can impose sanctions upon those admitted to practice in its courts, should not be deterred or diverted from the venture by the interloping of a federal court. As Mr. Justice Frankfurter observed in *Theard* v. *United States*, 354 U.S. 278, 281 (1957), the "two judicial systems of courts, the state judicatures and the federal judiciary, have autonomous control over the conduct of their officers, among whom, in the present context, lawyers are included."

Whatever federal constitutional questions are involved here can certainly be raised in the state courts and ultimately addressed to the Supreme Court, and appellant proffers no contrary contention.[3]

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3 The only other authority for the debility of *Erdmann* suggested by the appellant was the following *en passant* comment of Judge Oakes in a footnote in his dissenting opinion in *Tang* v. *Appellate Division*, 487 F.2d 138, 146 n.4 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974): "Even application of the doctrine of 'comity' in the disciplinary context in *Erdmann* is open to dispute, moreover, in view particularly of the Supreme Court's recent decision in *Gibson* v. *Berryhill*, 411 U.S. 564 . . . (1973)." In *Gibson*, the plaintiffs had brought an action against the Alabama Board of Optometry and the Alabama Optometric Association under 42 U.S.C. § 1983, seeking to enjoin administrative proceedings concerning professional misconduct brought against plaintiff optometrists. The Court held that *Younger* was not applicable since the claim was made that the Board was biased and unconstitutionally constituted and there was thus no opportunity for a competent state tribunal to decide the federal issues involved. This distinction was observed in *Huffman*, 43 U.S.L.W. at 4380. Aside from this, *Gibson* involved administrative and not judicial proceedings. There is here, of course, no claim of constitutional infirmity in the judicial body or its agent Committee. Even before *Gibson* the applicability of *Younger* to

II

Appellants seek to distinguish *Erdmann* by pointing out than the attorney-plaintiff in that case was seeking to enjoin a proceeding actually pending in the Appellate Division whereas the injunctive relief sought here is only to be directed to the Grievance Committee of the Bar Association. We do not consider the distinction to be meaningful. Section 90(2) of the New York Judiciary Law[4] provides that the Appellate Division of the Supreme Court in each Department is authorized to censure, suspend or remove from office counsellors-at-law admitted to practice. Rule 603.12 of the Rules of the Appellate Division, First Department,[5] empowers the Grievance Committee of the

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administrative proceedings was announced in *Geiger* v. *Jenkins*, 401 U.S. 985 (1971). In any event, it is now apparent that predictions of *Erdmann's* demise were premature.

4 Section 90(2) provides:

> The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

5 Rule 603.12 provides:

> (a) Upon application by the chairman or acting chairman of the Committee on Grievances of the Association of the Bar of the City of New York, or the Committee on Discipline of the New York County Lawyers' Association, or the Committee on Grievances of the Bronx County Bar Association, or the Co-Ordinating Committee on Discipline, disclosing that such committee in conducting a preliminary investigation of professional misconduct on the part of an attorney, or upon application by an attorney under such investigation, the clerk of this court shall issue subpoenas in the name of the presiding justice for the attendance of witnesses and produc-

defendant Association to conduct preliminary investigations of professional misconduct and to issue subpoenas in the name of the presiding justice. The Committee has an office and a staff to perform this function as an arm of the court, much as a special master appointed in the federal court. See *Erdmann* v. *Stevens, supra,* 458 F.2d at 1209. As Chief Judge Fuld, writing for a unanimous court in *Wiener* v. *Weintraub,* 22 N.Y. 2d 330, 331-32, 292 N.Y.S. 2d 667, 668-69 (1968), noted:

> Petitions or complaints charging professional misconduct of an attorney which, in the past, were presented to the General Term of the Supreme Court are now usually filed with the Grievance Committee of a bar association. And, it has been observed, a proceeding before such a committee constitutes a "judicial proceeding." In the investigation of such complaints and in the conduct of such proceedings, then, the bar association's Grievance Committee acts as a quasi-judicial body and, as such, is an arm of the Appellate Division.

(Citations omitted). See also *Doe* v. *Rosenberry,* 255 F.2d 118 (2d Cir. 1958) (holding the order of a district court judge, which authorized the transmittal of federal grand jury minutes to the Grievance Committee of the Association of the Bar of the City of New York, to be within Fed. R. Crim. P. 6(e), which provides for disclosure of matters occurring before a grand jury when so ordered by a court

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tion of books and papers before such committee, or any subcommittee of such committee, designated in such application, at the time and place within the First Judicial Department that said committee, or subcommittee, regularly meets.

(b) Each committee or subcommittee conducting such a preliminary investigation is empowered to take and transcribe the evidence of witnesses, who may be sworn by any person authorized by law to administer oaths.

"preliminarily to or in connection with a judicial proceeding.").

The fact that the Appellate Division may disregard the recommendations of the Committee emphasizes the role of that bench in determining the continuing qualifications of its bar. Interfering with its regular processes of investigation at this point would thwart that prerogative just as much as if the injunction had been sought at a later date. In our view, had Judge Griesa issued an injunction, there would have been an interference with a state judicial proceeding.

III

Appellant urges other reasons for avoiding *Younger* and *Erdmann* which are not persuasive. In *Younger*, as this court has recently pointed out in *Gajon Bar & Grill, Inc. v. Kelly*, slip op. 613 (Dec. 5, 1974), the Supreme Court emphasized that normally there should be no interference with state court proceedings absent very special circumstances involving danger of great and immediate irreparable loss. 401 U.S. at 45. The appellant here urges that the failure of the Committee to institute proceedings against him until 1973, although he testified before the grand jury in 1968 and the Committee obtained the minutes in 1971, constitutes such bad faith as to make *Younger* inapplicable.

In *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965), the Court found that the actions of state prosecutors were so harassing that, if the appellants had been denied federal relief, they would have suffered irreparable injury far beyond that associated with the defense of a single prosecution brought in good faith, which is the standard for intervention set by the *Younger* Court, 401 U.S. at 48. However, in *Dombrowski*, the appellants had offered to prove

> that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that . . . the prosecutor was continuing to threaten to initiate new prosecutions of appellants under the same statutes [whose doubtful constitutionality induced appellants to seek federal injunctive relief], was holding public hearings at which photostatic copies of the illegally seized documents were being used, and was threatening to use other copies of the illegally seized documents to obtain grand jury indictments against the appellants on charges of violating the same statutes.

*Younger* v. *Harris, supra,* 401 U.S. at 48.

All that is urged here to establish harassment is the lapse of time between the giving of the grand jury testimony and the initiation of the disciplinary proceeding. There is no showing of bad faith and no showing that the delay prejudiced the appellant or precluded him from defending the charges made in the disciplinary proceeding. He appeared by counsel and he was given a second hearing at his request, but, before even knowing of the determination of the second panel, he proceeded to the federal court. There is no indication that the defendants were "out to get" the plaintiff or that there was no basis in fact for bringing the action. *Allee* v. *Medrano,* 416 U.S. 802, 819, 836 (1974). In fact, the record indicates, if anything, solicitude for his rights.

Appellant also urges that abstention should not be invoked here because prior opinions of the New York courts have consistently held that attorneys may be disciplined even though solely on the basis of immunized testimony. Assuming that this is the fact, although we do not reach

the merits here, the argument hardly rises to the magnitude of the "extraordinary circumstance" which appellant characterizes it in an effort to come within the *Younger* rule. The courts in New York are certainly competent to consider and determine federal constitutional questions, and if, as appellant claims, the United States Supreme Court has made contrary decisions construing the application of Fifth Amendment rights in disbarment proceedings, the New York courts are no more free to disregard them than we are. The expectation of lack of success on the constitutional questions at the state level cannot be equated with the arbitrary disregard of constitutional rights referred to in such cases as *Dombrowski* and *Allee, supra.* There is no suggestion that the New York courts are either hostile to the plaintiff or that they are deliberately ignoring or disregarding Supreme Court precedent. If the appellant does not persuade the state courts to adopt his view, he can ultimately seek relief in the Supreme Court. The Supreme Court rejected a contention similar to appellant's in *Huffman* v. *Pursue, Ltd., supra:*

> [W]e are of the opinion that the considerations of comity and federalism which underlie *Younger* permit no truncation of the exhaustion requirement merely because the losing party in the state court of general jurisdiction believes that his chances of success on appeal are not auspicious. . . . Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsibilities. This we refuse to do.

43 U.S.L.W. at 4385.[6]

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6 The only authority cited by appellant is *Helfant* v. *Kugler*, 484 F.2d 1277 (3d Cir. 1973), reconsidered en banc, 500 F.2d 1188, cert. granted, 95 S. Ct. 492 (1974). The facts in that case are totally different from those before us and, as the court there repeatedly stressed, e.g., 500

Finally, appellant argues that, if he is not entitled to injunctive relief, he is at least deserving of a declaratory judgment on the constitutional issue. Since we have held that there is a pending judicial proceeding in the state court within the scope of *Younger*, the appellant is clearly not entitled to declaratory relief. *Steffel* v. *Thompson*, 415 U.S. 452, 461 (1974); *Samuels* v. *Mackell*, 401 U.S. 66 (1971).

Affirmed.

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F.2d at 1197, were extraordinary. A state court judge who had taken the Fifth Amendment before a grand jury investigating corruption was called into the chambers of the New Jersey Supreme Court, where he was questioned by members of that court as to why a judge should take advantage of the constitutional privilege. He advised the court that he would testify; he did and was later indicted. He then claimed that his testimony before the grand jury was coerced by the Jersey Supreme Court. His federal action, which alleged that his Fifth Amendment rights had been violated by the very court which would ultimately determine the merits of his case and which could make its own findings of fact de novo, sought declaratory and injunctive relief against the pending state prosecution. The Third Circuit denied the plaintiff's request for injunctive relief upon the authority of *Younger* v. *Harris*, but held that *Younger* did not preclude the issuance of limited declaratory relief as to the voluntariness of his grand jury testimony in light of the extraordinary circumstances making resort to the state courts on the voluntariness question an inadequate remedy. These "extraordinary circumstances" certainly do not appear here. There is not a hint or even an allegation of any improper involvement by the Committee or the state courts in appellant's case.

## OPINION OF THE UNITED STATES DISTRICT COURT BY THOMAS P. GRIESA, U.S.D.J.

United States District Court
Southern District of New York

ANONYMOUS, an Attorney Admitted to Practice in the State of New York,

Plaintiff,

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

Defendants.

74 Civ. 2398

GRIESA, J.

Plaintiff is an attorney admitted to practice in the State of New York, against whom disciplinary proceedings are pending before the Committee on Grievances of the Association of the Bar of the City of New York (hereafter "Bar Association"). Defendants are the Bar Association and John G. Bonomi, chief counsel to the Bar Association's Committee on Grievances. Plaintiff has brought this action seeking injunctive relief against the use by defendants in the disciplinary proceedings of grand

jury testimony given by plaintiff under a grant of immunity. Plaintiff claims that such use of compelled testimony is unconstitutional in violation of his Fifth Amendment right against self-incrimination, as made applicable to the states by the Fourteenth Amendment.

Plaintiff has moved for a preliminary injunction. Defendants have cross-moved to dismiss the action on the ground that the complaint fails to state a claim upon which relief can be granted. Plaintiff's motion is denied. Defendants' motion is granted.

## Facts

### History of the Disciplinary Proceedings

At various times in 1967 and 1968 plaintiff testified before the New York County Grand Jury, under a grant of immunity from prosecution, concerning the role he and others played in certain events in 1965 and 1966. Defendants allege that plaintiff admitted to the grand jury that he had participated as an intermediary in negotiations for the transfer of a sum of money intended to unlawfully block, or delay approval of, an application for a zoning variance then pending before a New York City agency. These alleged activities are the basis of the disciplinary charges presently pending against plaintiff.

Although plaintiff appeared before the grand jury in 1967 and 1968, his name did not come to the attention of the Committee on Grievances, in connection with possible unprofessional conduct, until some time in 1969 or 1970.

*Opinion — District Court*

On February 4, 1971 defendants obtained an order in New York County Supreme Court authorizing the release of certain grand jury minutes which included the testimony which had been given by plaintiff.

On January 11, 1973 the Committee requested plaintiff to appear at the Committee's office to discuss his grand jury testimony. Plaintiff retained counsel, who requested that he be permitted to submit a written statement by plaintiff in lieu of a personal appearance. The request was granted, and plaintiff submitted a statement dated April 26, 1973 which detailed his role in the events of 1965 and 1966.

On May 31, 1973 the Committee instituted a disciplinary proceeding against plaintiff by serving on him a written notice of charges of unprofessional conduct concerning the events he testified about before the grand jury. On June 13, 1973 plaintiff submitted an answer admitting certain of the facts alleged by the Committee, but denying any illegal or unprofessional conduct on his part. On June 21, 1973 a hearing was held during which plaintiff's grand jury testimony and his April 26, 1973 statement were received in evidence without any objection by plaintiff or his counsel. Plaintiff also testified on his own behalf, and was cross-examined by counsel for the Committee. The panel of the Committee before whom the hearing was held sustained the charges and recommended that a disciplinary proceeding be instituted against plaintiff in the Appellate Division.

On March 7, 1974 plaintiff, having obtained new counsel, appealed to the chairman of the Committee for a new hearing on

the basis of certain procedural irregularities and the admission into evidence of plaintiff's grand jury testimony. A new hearing was granted, but the reasons for doing so were not specified.

On April 16, 1974 plaintiff was served with a new notice of charges. On May 30, 1974, in the course of a hearing on the charges, the panel of the Committee hearing the charges received into evidence, over plaintiff's objection, plaintiff's grand jury testimony.

On June 4, 1974 plaintiff filed this action.

Procedures of the Committee on Grievances

The Committee on Grievances is a standing committee of the Association of the Bar of the City of New York. It has authority, derived from Judiciary Law 90, subds. 7 and 8 and Rule 603.12 of the Rules of the Appellate Division, First Department to investigate charges of professional misconduct, to compel the attendance of witnesses and the production of records, to take testimony, to admonish attorneys in appropriate cases and to recommend prosecution of disciplinary proceedings before the Appellate Division.

Where further prosecution is recommended by the Committee, and authorized by the Appellate Division, a de novo hearing is held before a referee. The Appellate Division makes findings, and enters an order, based on this new hearing.

It appears that, in proceedings before the Appellate Division, counsel for the Committee are usually appointed to act as prosecutors.

*Opinion — District Court*

Conclusions of Law

Plaintiff contends that use in the disciplinary proceeding of his grand jury testimony, compelled under a grant of immunity from prosecution, violates his Fifth Amendment right against self-incrimination. Defendants contend that a disciplinary proceeding is not a criminal prosecution, and therefore the Fifth Amendment is not applicable. Defendants assert that the New York courts have explicitly held constitutional such use of compelled testimony, *Matter of Klebanoff*, 21 N.Y.2d 920, 289 N.Y.S.2d 755 (1968), *cert. denied*, 393 U.S. 840 (1968); *Zuckerman v. Gleason*, 20 N.Y.2d 430, 285 N.Y.S.2d 1 (1967), *cert. denied*, 390 U.S. 925 (1968), and that various decisions of the United States Supreme Court point to the same conclusion. *See, e.g., Gardner V. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack V. Klein*, 385 U.S. 511 (1967). Plaintiff contends that these Supreme Court cases and other federal court authorities compel the opposite conclusion.

However, it is inappropriate for me to decide this question because I hold that the doctrine of federal court abstention applies, *Younger v. Harris*, 401 U.S. 37 (1971), and that plaintiff's complaint must be dismissed on this ground.

This result is dictated by the recent decision in *Erdmann v. Stevens*, 458 F.2d 1205 (2d Cir. 1972), *cert. denied*, 409 U.S. 889 (1972). In that case the plaintiff brought an action in the federal district court seeking declaratory and injunctive relief against

disciplinary proceedings pending against him in the Appellate Division. He claimed that the proceedings were brought with a view to discouraging his exercise of First Amendment rights. The Court of Appeals affirmed the District Court's action in denying an injunction and dismissing the action.

The court held that the abstention doctrine set forth in *Younger v. Harris* applies to a disciplinary proceeding before the Appellate Division. The court found that such proceedings are judicial, not administrative, in nature. Judge Mansfield, writing for himself and Judge Mulligan, noted that it is an open question whether the abstention doctrine applies with respect to state civil suits as well as state criminal prosecutions. He found, however, that it was unnecessary to resolve that question since in his and Judge Mulligan's view "a court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding." 458 F.2d at 1209. Judge Mansfield went on to characterize such proceedings as "quasi-criminal" in nature. 458 F.2d at 1211. The opinion of Judges Mansfield and Mulligan also stated that the *Younger* abstention doctrine should be applied because of the unique relationship between the courts of a state and the attorneys admitted to practice before it.

> "The relationship between a court and those practicing before it is a delicate one. It would appear axiomatic that the effective functioning of any court depends upon its ability to command respect not only from those licensed to practice before it but also from the public at large. It

> requires little vision to appreciate that if a state court were subject to the supervisory intervention of a federal overseer at the threshold of the court's initiation of a disciplinary proceeding against its own officer, the state judiciary might suffer an unfair and unnecessary blow to its integrity and effectiveness." 458 F.2d at 1210.

Judge Lumbard, in a concurring opinion, stated:

> "While these principles [ of abstention ] were stated in cases involving state criminal proceedings, I believe that they apply with equal force to proceedings regarding the conduct of members of the state bar." 458 F.2d at 1213.

Plaintiff points to language in a dissenting opinion by Judge Oakes in *Tang v. Appellate Division*, 487 F.2d 138, 146 n.4 (2d Cir. 1973), *cert. denied*, 42 U.S.L.W. 3555 (Apr. 1, 1974) as indicating that *Erdmann* may no longer be valid in light of the Supreme Court's recent decision in *Gibson v. Berryhill*, 411 U.S. 564, 575-577 (1973). But it would appear that *Gibson* is distinguishable from *Erdmann*, since in *Gibson* the disciplinary proceeding sought to be enjoined was before the state Board of Optometry, not any court or any committee acting under powers granted by a court.

It might be argued that the recent case of *Blouin v. Dembitz*, 489 F.2d 488 (2d Cir. 1973), departed to some extent

from the rationale of *Erdmann*. In *Blouin* Judge Smith, in an opinion joined by Chief Judge Kaufman and Judge Oakes, stated:

> "But we do believe that the particularly strigent formulation of that doctrine in *Younger* should be limited, at least until the Court instructs otherwise, to cases involving traditionally criminal proceedings." 489 F.2d at 490-491.

However, the fact remains that there has been no express overruling or disapproval of *Erdmann* by the Second Circuit or the Supreme Court. Clearly I am bound by *Erdmann*.

Plaintiff contends that there is an illogic in defendants' position that, on the one hand, the Fifth Amendment protection against self-incrimination does not apply to a disciplinary proceeding because such proceeding is not criminal in nature, and, on the other hand, the *Younger* abstention doctrine applies because such a proceeding *is* criminal in nature. If there is an anomaly here, plaintiff's position is at least as difficult. Plaintiff argues that a disciplinary proceeding should be held criminal in nature to permit application of the Fifth Amendment privilege, but non-criminal to prevent application of *Younger*.

These problems are interesting to consider, but they do not detract from the controlling force of *Erdmann*, which dictates that I must abstain from interference with the pending disciplinary proceedings against plaintiff. It should be noted, as indicated by the quotations above, that *Erdmann* does not rest

solely on the theory that a disciplinary proceeding is comparable to a criminal action, but relies in part on the theory that the courts of a state have a unique interest in their relationship with attorneys practicing in those courts, and the federal courts should be reluctant to interfere with that relationship.

Plaintiff contends that *Erdmann* can be distinguished from the present case, because there the disciplinary proceeding was before the Appellate Division, whereas here the disciplinary proceeding is before the Committee on Grievances. He contends that the present proceedings are not a *pending* state judicial proceeding, and therefore the considerations of equity, comity and federalism underlying the abstention doctrine do not apply. *Steffel v. Thompson*, __U.S.__, 42 U.S.L.W. 4357, 4360 (March 19, 1974).

This contention must be rejected. The court in *Erdmann* described the closely related role of bar associations and the Appellate Division in disciplinary proceedings as follows:

> "Under § 90(2) of the New York Judiciary Law (McKinney's Consol. Laws, c.30, 1968) the Appellate Division of each judicial department in the state is given the exclusive power to resolve issues as to alleged misconduct of attorneys practicing within its jurisdiction. To implement this power it is vested with authority to hold a hearing to determine the facts of the alleged misconduct and to apply to them the relevant

> standards of conduct laid down in the Code of Professional Responsibility. Although the court, for practical reasons, invokes the assistance of bar associations and their committees to investigate and conduct hearings with respect to complaints regarding members of the bar, just as a federal court may employ special masters to hear and report, Rule 53, F.R. Civ. P., the disciplinary power continues to rest exclusively with the court." 485 F.2d at 1209.

Thus the *Erdmann* decision recognizes that a bar association committee acts to assist the state court, and derives its power from that court. A disciplinary proceeding commenced by a bar association committee and continued before the court is all part of one judicially ordained process. I would find it arbitrary to have the rule of the *Erdmann* case applicable to proceedings actually before the Appellate Division, but *not* applicable to proceedings at the bar association stage.

I note that *Wiener v. Weintraub*, 22 N.Y.2d 330, 292 N.Y.S.2d 667 (1968), holds that a letter, addressed to a bar association grievance committee and containing accusations against an attorney, is the initiation of a judicial proceeding and therefore absolutely privileged against a claim of libel.

Plaintiff further contends that the doctrine of abstention should not apply, because it is futile for plaintiff to pursue his constitutional argument in the state courts. Plaintiff argues that the New York courts have conclusively ruled that grand jury

testimony compelled under a grant of immunity is admissable in a disciplinary proceeding. *Matter of Klebanoff*, 21 N.Y.2d 920, 289 N.Y.S.2d 755 (1968), *cert. denied*, 393 U.S. 840 (1968); *Zuckerman v. Gleason*, 20 N.Y.2d 430, 285 N.Y.S.2d 1 (1967), *cert. denied*, 390 U.S. 925 (1968). However, I cannot concede the futility of resort to the "traditional method of obtaining adjudication of federal constitutional questions arising out of . . . disciplinary proceedings" — *i.e.*, state court action followed by request for Supreme Court review. *See Erdmann*, 458 F.2d at 1211. I cannot concede that such a process is futile as to any really meritorious federal constitutional claim.

There is a further reason why federal intervention at this time is inappropriate. Defendants claim that, in failing to object to the use of his grand jury testimony at the first committee hearing in 1973, plaintiff waived any Fifth Amendment claim he may have had. On the other hand, plaintiff asserts that there was never any intention to waive any claims. This factual issue, if determined adversely to plaintiff, might moot the broader constitutional issue of whether testimony compelled under a grant of immunity may be used in a disciplinary proceeding. It would seem appropriate to permit the state courts to pass on this waiver issue.

Plaintiff claims that the court should nonetheless intervene since the disciplinary proceeding is brought in bad faith. *See Younger v. Harris*, 401 U.S. 37, 54 (1971). Plaintiff claims that there was a two-year delay in initiating the disciplinary proceeding from the time the grand jury transcripts became available. But such a delay hardly amounts to the kind of bad

faith and harassment, with no hope of ultimate success in the prosecution, which the courts have found necessary to justify making an exception to the general rule of abstention. *E.g.*, *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

Plaintiff raises an additional argument about bad faith. Plaintiff asserts that at the time he was granted immunity, prior to testifying before the grand jury, the District Attorney's office led him to believe that the testimony would not be referred to the Committee on Grievances, nor would the District Attorney's office recommend to the Committee that disciplinary action be taken. However, I conclude that this argument does not raise the kind of "bad faith" issue referred to in the abstention cases. This argument raises another factual and legal issue appropriate for decision in the state courts — *i.e.*, the scope of the agreement made with plaintiff at the time of his testimony.

Conclusion

Plaintiff's motion for a preliminary injunction is denied, and defendants' motion to dismiss the complaint is granted.

So ordered.

Dated: New York, New York
July 31, 1974

s/Thomas P. Griesa
Thomas P. Griesa
U.S.D.J.

**SUMMONS AND COMPLAINT**

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Civil Action File No.

ANONYMOUS, an Attorney Admitted to Practice in the State of New York,

Plaintiff

v.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

Defendants

To the above named Defendant:

You are hereby summoned and required to serve upon ANDERSON, RUSSELL, KILL & OLICK, P.C., plaintiff's attorneys, whose address, 600 Fifth Avenue, New York, N.Y. 10020, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon

you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

*Clerk of Court.*

*Deputy Clerk.*

Date: New York, New York
June 4, 1974

[ Seal of Court]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANONYMOUS, an Attorney Admitted to Practice in the State of New York,

Plaintiff,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the Bar of the City of New York,

Defendants.

*Summons and Complaint*

74 Civ. 2398-TPG

Plaintiff, by his attorneys, ANDERSON, RUSSELL, KILL & OLICK, P.C., for his complaint herein, alleges as follows:

## JURISDICTION

1. This action arises under the Constitution and Laws of the United States and is brought under Amendments V and XIV of the Constitution and Title 28 United States Code §§1331, 1343, 2201 and 2202 to declare as unconstitutional and void and to restrain and enjoin the enforcement of Sections 90 and 476a of the Judiciary Law of the State of New York, the Canons of Professional Ethics and Part 603 of the Rules of the Appellate Division of the Supreme Court of the State of New York in and for the First Department insofar as the same permit the use in disciplinary proceedings against attorneys of testimony elicited under a grant of immunity from prosecution following an attorney's exercise of his constitutional privilege against self-incrimination and thereby deny attorneys the equal protection of the law.

2. The matter in controversy exceeds the sum of $10,000 exclusive of interest and costs.

## PARTIES

3. Plaintiff, ANONYMOUS, is an attorney and counselor at law duly admitted to practice in the State of New York with offices and a principal place of business in the County, City and State of New York.

4. Upon information and belief, defendant, The Association of the Bar of the City of New York is an organization or association of attorneys with offices and a principal place of business in the County, City and State of New York, designated by Sections 476a and 90 of the Judiciary Law of the State of New York and Part 603 of the Rules of the Appellate Division of the Supreme Court held in and for the First Department to conduct preliminary investigation of professional misconduct through its Committee on Grievances and to recommend to the Courts and to prosecute before the Courts of the State of New York matters involving the discipline of attorneys.

5. Defendant, John G. Bonomi, is Chief Counsel to the Committee on Grievances of the Association of the Bar of the City of New York with offices and a principal place of business in the County, City and State of New York in which capacity he is the chief investigator and principal prosecutor in matters involving the discipline of attorneys.

## CLAIM

6. Heretofore and on or about October 5, 1968, plaintiff was called to testify before a Grand Jury empanelled by the Supreme Court of the State of New York, held in and for the County of New York at which time he refused to testify on the grounds, *inter alia*, that his answers, to the questions propounded might tend to incriminate him.

7. Thereupon the said Grand Jury, on recommendation of the District Attorney of New York County, granted plaintiff

immunity from any state action or violation arising out of or incident to his testimony before it.

8. Plaintiff thereafter on October 5, 1968, November 15, 1968 and November 21, 1968 testified fully, freely and truthfully pursuant to such grant of immunity.

9. On or about April 16, 1974, defendants instituted disciplinary proceedings against plaintiff based solely and exclusively upon his testimony under grant of immunity before the New York County Grand Jury.

10. Defendants have failed and refused, despite plaintiff's application therefor, to preclude the use of plaintiff's said Grand Jury testimony and are now proceeding to use the same against him in hearings now pending before the Committee on Grievances of the Association of the Bar of the City of New York being prosecuted by defendant Bonomi, all in violation of plaintiff's rights under the Fifth and Fourteenth Amendments to the United States Constitution.

11. Upon information and belief, defendants' aforesaid actions in proceeding against plaintiff are based solely and exclusively on his testimony before a New York County Grand Jury under grant of immunity and are part of a plan and program designed to undermine and subvert the constitutional privilege against self-incrimination as applied to that class or category of citizens known as attorneys and to deny them the equal protection of the laws and are part of a plan to employ disciplinary proceedings and threats of disbarment to discourage attorneys from exercising such constitutional rights.

12. Plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays:

(a) For an order granting a preliminary injunction in this action enjoining defendants, their representatives, agents and employees, and all those acting in concert with them from proceeding with disciplinary proceedings against plaintiff pending entry of final judgment herein; and

(b) For entry of final judgment declaring that attorneys may not be subjected to disciplinary proceedings on the basis of judicially compelled testimony elicited under grants of immunity and permanently enjoining defendants, their representatives, agents and employees, and all those acting in concert with them, from disciplining plaintiff on the basis of such compelled testimony; and

(c) For such other and further relief as to the Court may seem just and proper in the premises, including the costs and disbursements of this action.

Dated: New York, New York
June 3, 1974

ANDERSON, RUSSELL,
KILL & OLICK, P.C.,
Attorneys for Plaintiff
By: s/Steven M. Pesner
A Member of the Firm
600 Fifth Avenue
New York, New York 10020
(212) 541-8100

## SECTION 90(2) OF THE JUDICIARY LAW OF NEW YORK, IN PART

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice.

## SECTION 90(7) OF THE JUDICIARY LAW OF NEW YORK

7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

## RULE 603.12 OF THE RULES OF THE APPELLATE DIVISION, FIRST DEPARTMENT

*Preliminary Investigation of Professional Misconduct on the Part of an Attorney; Subpoenas and Examination of Witnesses Under Oath*

(a) Upon application by the chairman or acting chairman of the Committee on Grievances of the Association of the Bar of the City of New York, or the Committee on Discipline of the New York County Lawyers' Association, or the Committee on Grievances of the Bronx County Bar Association, or the Co-Ordinating Committee on Discipline, disclosing that such committee is conducting a preliminary investigation of professional misconduct on the part of an attorney, or upon application by an attorney under such investigation, the clerk of this court shall issue subpoenas in the name of the presiding justice for the attendance of witnesses and production of books and papers before such committee, or any subcommittee of such committee, designated in such application, at the time and place within the First Judicial Department that said committee, or subcommittee, regularly meets.

(b) Each committee or subcommittee conducting such a preliminary investigation is empowered to take and transcribe the evidence of witnesses, who may be sworn by any person authorized by law to administer oaths.

## BY-LAW XIX OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

### BY-LAW

### XIX

### COMMITTEE ON GRIEVANCES

1. There shall be a standing Committee on Grievances of twenty-one members and a chairman.

2. The chairman of the committee shall divide the committee into subcommittees of not less than five members, three of whom shall constitute a quorum. Each such committee shall have all the powers granted to the committee by this section. The chairman may designate three of the members of the committee as vice-chairman, who, in the order of designation, shall exercise the powers and duties of the chairman in his absence. Each vice-chairman also shall, in the absence of the chairman, act as chairman of any subcommittee of which he is a member.

3. The committee shall have power to consider and investigate the conduct of any member of the Association wherever he may be practicing and of any other attorney: (a) who resides, maintains an office or practices law within the City of New York; or (b) who was admitted to practice in the First Judicial Department; or (c) where the conduct under investigation took place in whole or in part, within the City of New York. The committee shall also have power to consider and

investigate methods of preventing the unlawful practice of law by corporations and by any person not regularly admitted to practice as an attorney in the courts of record of the State, and to consider and investigate instances of such unlawful practice by any corporation or person.

4. The committee or its Chief Counsel may initiate any investigation or may undertake the same upon complaint by any person. If, after any such investigation, the committee, or the chairman, a vice-chairman or the Chief Counsel of the committee shall deem a matter of sufficient importance, written charges predicated thereon, stating plainly the matter or matters charged, together with a notice of not less than five days of the time and place where the committee, or a subcommittee, will meet for consideration thereof, shall be served upon the person concerned (hereinafter called the respondent), either personally or by certified mail, or in such other manner as the committee may direct. At the time and place appointed, or at such other time or place as may be named by the committee or its Chief Counsel and notice of which is served upon the respondent in the manner provided for herein, the respondent shall file a written answer; and the committee or such subcommittee in each case, exclusive of any member who may have made the complaint, shall proceed to a hearing of the case. The respondent shall appear personally, unless excused by the committee or its Chief Counsel, and may be represented and assisted by counsel if he so desires. The committee or its subcommittee shall decide all questions of evidence.

5. Whenever, in the course of any hearing under this by-law, evidence shall be presented upon which another charge or

charges against the respondent might be made, it shall not be necessary for the committee to prepare and serve such additional charge or charges on the respondent, but the committee, or the subcommittee hearing the case, may, after reasonable notice to the respondent and an opportunity to answer and be heard, proceed to the consideration of such additional charge or charges as if they had been made and served at the time of service of the original charge or charges, and may render such decision upon all such charges as may be justified by the evidence in the case.

6. Before the commencement of any hearing under this by-law the respondent may object peremptorily to not more than three members of the committee. Any person so objected to shall not participate in any way in the hearing or determination of the matter. The places of those objected to shall be supplied for the purposes of the hearing by appointment by the chairman or a vice-chairman of the committee, from the membership of the committee.

7. Action other than dismissal of the charges shall be taken only upon the affirmative vote of at least four of the members (of whom at least two shall have heard the entire case and the other two shall either have heard the entire case or read the transcript of the case) of the committee or subcommittee hearing the case.

8. In all proceedings concerning alleged misconduct of a member of the Association in his relations to the Association, the committee, or its subcommittee, if it does not dismiss the

charges, may find the respondent guilty of the charges against him, and may adjudge that he be expelled, suspended, or otherwise disciplined. No expulsion, suspension or other discipline so adjudged by the committee shall become effective until approved by the affirmative vote of a majority of the whole Executive Committee. The Executive Committee may, by the vote of a majority of the whole Executive Committee, impose a lesser penalty than that adjudged by the Committee on Grievances. All such proceedings, except final action taken by the Executive Committee, shall be secret. Nothing in this by-law shall apply in respect of, or in any manner whatever affect, the provisions of By-Law X.

9. In all proceedings other than those referred to in paragraph 8 hereof, the committee, or its subcommittee, shall either dismiss or sustain the charges and, as to any charges sustained, shall either admonish the respondent or recommend that such charges be prosecuted in the courts. If the respondent is a member of the Association, the committee, or its subcommittee, may, if any charges are sustained, also adjudge, without further or other notice than that theretofore given, that the respondent be expelled, suspended or otherwise disciplined, subject to the approval of the Executive Committee as set out in paragraph 8 hereof.

10. If the committee, or its subcommittee, recommends the prosecution of any charges in the courts, it shall submit to the Executive Committee a written report summarizing the charges, the evidence, and the findings and recommendations of the committee or subcommittee. The Executive Committee may take

such action upon such report as in its judgment is proper, except that approval of a recommendation of prosecution of charges in the courts shall be by the affirmative vote of a majority of the whole Executive Committee, or two-thirds of the members of the Executive Committee present at the meeting, whichever is greater.

11. If the Executive Committee shall approve prosecution of the respondent in the courts, the Executive Committee may appoint, or authorize the President to appoint, one or more members of the Association whose duty it shall be to conduct the prosecution of the respondent under the instructions and control of the Committee on Grievances; the Executive Committee may authorize the Committee on Grievances to make such appointment and conduct such prosecution, provided that no expense or liability shall be incurred by the Committee on Grievances for such purpose not previously authorized by the Executive Committee.

12. The Executive Committee may in its discretion in any case in which (a) an attorney has been convicted of a crime involving moral turpitude, or (b) it deems that the public interest requires prompt action, authorize prosecution of the attorney in the courts without the preliminary investigation hereinabove prescribed, provided that the resolution authorizing such prosecution be adopted by the affirmative vote of a majority of the whole Executive Committee, or two-thirds of the members of the Executive Committee present at the meeting, whichever is greater.

*By-Law XIX*

13. Any member of the Association called as a witness in any proceeding under this by-law or requested by the committee or its Chief Counsel to furnish any relevant information shall be bound to appear and to give his testimony or to furnish such information, unless for sufficient reason he shall be excused by the committee or by the Executive Committee. Any unexcused neglect or refusal to appear or to give testimony or to furnish relevant information, after request by the Committee on Grievances or its Chief Counsel, on the part of such member may be reported to the Executive Committee for its action. In case of his continuing and unexcused refusal, the Executive Committee, after giving the member such notice and opportunity to be heard as it shall deem proper, shall have power, by the affirmative vote of a majority of the whole Committee, to expel, suspend or otherwise discipline him.

14. The Executive Committee from time to time shall appoint an attorney to be the Chief Counsel for the Committee on Grievances, and it may also appoint one or more attorneys to be assistants to the Chief Counsel. The Chief Counsel and his assistants shall either be members of the Association at the time of their appointment or shall apply for membership upon their appointment, with their continued employment to be contingent upon their acceptance into membership. The Chief Counsel and his assistants shall perform such services as may be prescribed by the Committee on Grievances or by the Executive Committee. The Executive Committee shall fix the compensation of the Chief Counsel and assistants.

*By-Law XIX*

15. Unless otherwise ordered by the Appellate Division, all proceedings under this by-law (other than proceedings concerning alleged misconduct of members in their relations to the Association) shall be secret until a final order imposing discipline is entered by the Appellate Division.

## AFFIDAVIT OF MARK A. LANDSMAN DATED JULY 8, 1974

United States District Court

Southern District of New York

ANONYMOUS, an Attorney Admitted to Practice in the State of New York,

Plaintiff,

-against-

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK and JOHN G. BONOMI, Chief Counsel, Committee on Grievances of the Association of the City of New York,

Defendants.

74 Civ. 2398 (TPG)

STATE OF NEW YORK )
ss.:
COUNTY OF KINGS )

MARK A. LANDSMAN, being duly sworn, deposes and says:

1. I am an attorney duly admitted to practice law before the Courts of the State of New York, the United States District

Courts, Southern and Eastern Districts of New York, and I maintain law offices at 66 Court Street, Brooklyn, New York.

2. In addition I am the duly elected Village Justice of the Village of Atlantic Beach of Nassau County, State of New York.

3. This affidavit is submitted at the request of Arthur S. Olick, Esq., a member of the firm of Anderson, Russell, Kill and Olick, attorneys for the plaintiff-attorney and in support of the relief sought for injunctive or declaratory judgment relief against the defendants herein.

4. It is sincerely and respectfully the intention of your deponent that the historical facts provided hereinafter may, in some material measure, prove of assistance to this Honorable Court in its deliberations upon the issues presented before it.

5. During approximately September of 1968, your deponent was retained by the plaintiff-attorney herein, as his counsel, in connection with a request he received from the office of the District Attorney, County of New York for his appearance to furnish testimony as a witness before the October, 1968 Grand Jury in a matter entitled People v. John Doe; said matter being an inquiry involving a complaint against another attorney, Michael Freyberg.

6. Upon arrival at the offices of the District Attorney in New York County, during October of 1968, your deponent determined that this inquiry was being conducted by Francis J. Rogers, an Assistant District Attorney. After detailed

discussions with Mr. Rogers and other officials of the District Attorney's office to the effect that if called to testify before the Grand Jury, the plaintiff-attorney herein would properly invoke his Constitutional privilege against self-incrimination as guaranteed to him by the Fifth Amendment to the United States Constitution, it was agreed that plaintiff-attorney would, if he testified fully, truthfully and cooperated with the state authorities, be granted full transactional immunity.

7. However, with the possibility present that some aspect or part of his testimony might cause, or perhaps give rise, to an interpretation that one or more of the Canons of Professional Ethics appeared violated, your deponent also deemed it necessary and proper to protect his client and to obtain an understanding with and committment from, the District Attorney's Office that they would neither refer the testimony of the plaintiff-attorney to the Association of the Bar of the City of New York nor recommend to such body that any punitive disciplinary action be taken against the plaintiff-attorney, as a result of that State Authority having compelled his testimony to be given under the grant of complete immunity. It was, accordingly, the clear understanding of all parties that the plaintiff-attorney would furnish testimony fully, truthfully and cooperatively without fear of any subsequent criminal or disciplinary prosecutions arising out of such compelled testimony.

8. Your deponent, upon information and belief, submits that the plaintiff-attorney was cooperative with the State Authorities and that he did, indeed, testify fully and truthfully;

that he never knew, met or spoke with any of the public official targets of the investigation, i.e., Messrs. Freyberg, Itkin or Marcus; and that, in fact, Messrs. Freyberg, Itkin and Marcus also furnished testimony and/or statements to the effect that they never knew, met or spoke with, the plaintiff-attorney.

9. Your deponent is further advised that no indictments relating to conspiracy, bribery or any crimes (other than perjury) were ever returned by the Grand Jury as to any of the parties who gave testimony as to this matter; no crimes, other than false swearing, were charged against any persons in connection with this inquiry into the delaying or blocking of a certain application for a zoning variance before the City Planning Commission.

10. In any event, the facts and circumstances surrounding the promises and immunities granted to the plaintiff-attorney by the authorized representatives of the state authority, are, to the best of my recollection, accurately recited hereinabove and they actually took place and occurred in my presence and as well as in the presence of the plaintiff-attorney.

11. Should this Honorable Court deem as necessary, any further particulars in connection with the foregoing, your deponent will remain available, of course, to so cooperate.

s/ Mark A. Landsman
Mark A. Landsman

*Affidavit*

Sworn to before me this

8th day of July, 1974.

s/ Richard I. Rosenkranz
RICHARD I. ROSENKRANZ
Notary Public, State of New York
No. 31-8656465
Qualified in New York County
Commission Expires March 30, 1976